

Sample ROC

United States Department of the Interior Record of Compliance for a Rulemaking Document

| | |
|---|---------------|
| Title of Rule-Marine Mammals; Incidental Take During Specified Activities | RIN:1018-AF54 |
| Sponsoring bureau/office: U.S. Fish and Wildlife Service | |
| Contact name/phone number: Jeffrey L. Horwath/703-358-1718 | |

The Record of Compliance (ROC) certifies that this rulemaking action complies with the various statutory, Executive Order, and Department Manual requirements applicable to rulemaking. Some of the statutory requirements are judicially reviewable. Accordingly, the ROC also provides a brief though convincing rationale for the various certifications with citations to any underlying analyses.

A. What is the need for this regulation?

1. Why we are publishing this rule. This rule is necessary for the U.S. Fish and Wildlife Service (Service) to comply with provisions of Section 101(a)(5)(A) of the Marine Mammal Protection Act (Act) and implementing regulations in 50 CFR 18.27. The Service is proposing specific "umbrella" regulations that would authorize the incidental, but not intentional, take of small numbers of polar bears and Pacific walrus during oil and gas exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska.

Upon request by citizens of the United States (as defined in 50 CFR 18.27(c)), Section 101(a)(5)(A) of the Act authorizes the Service, acting on behalf of the Secretary of the Interior, to allow during periods of not more than 5 consecutive years the incidental, but not intentional, taking of small numbers of marine mammals within a specified geographical region during specified activities (other than commercial fishing). However, before such takes may be allowed, the Service must find, based on the best scientific evidence available, that the total taking during the specified time period will have a negligible impact on the species or stock and will not have an unmitigable adverse effect on the availability of the species or stock for subsistence uses. If these findings are made, the Service then is required to establish specific regulations for each allowed activity setting forth: (1) permissible methods of taking; (2) means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses; and (3) requirements for monitoring and reporting these takes.

On December 17, 1991, BP Exploration (Alaska), Inc. (hereafter referred to as BP), for itself and on behalf of 14 other oil and gas companies submitted a petition to the Service for specific regulations to allow for a 5-year period of incidental, but not intentional, take of small numbers of polar bears and Pacific walrus in the Beaufort Sea and adjacent northern coast of Alaska. On November 16, 1993, after 23 months of review and public comment, regulations were issued with an effective date of December 15, 1993. However, the regulations initially were effective for a period of only 18 months with stipulations that they would be extended for the full 5-year period allowed by the Act if the Service completed

and began implementing a polar bear habitat conservation strategy. On August 17, 1995, these conditions were met and the regulations were made effective for a full 5-year period through December 15, 1998.

On August 28, 1997, BP submitted a petition for rule making to allow the incidental, but not intentional, taking of small numbers of polar bears and Pacific walrus in the event that such a result occurs in the course of oil and gas exploration, development, and production operations in Arctic Alaska. The application requested an extension of the then, in-place incidental take regulations for an additional 5-year term, from December 16, 1998, through December 15, 2003. On January 28, 1999, we issued final regulations effective through January 30, 2000. BP's August 28, 1997, petition included activities that require a subsea pipeline to transport the crude oil to existing onshore facilities. Since this was a new activity that had the potential to create a more than negligible impact to polar bears, we issued the regulations to be effective for only one year during which time we would consider new information associated with subsea pipelines. Through the regulations BP is seeking to avail itself of the provisions of the Act that deal specifically with the issue of continued authorization of the incidental take of marine mammals during specified activities.

This rulemaking does not authorize the actual activities associated with oil and gas industry operations; the Department of the Interior's Minerals Management Service is responsible for permitting activities associated with such operations. Instead, this rulemaking authorizes the issuance of Letters of Authorization (LOA) that will permit the unintentional takes of small numbers of polar bears and Pacific walrus incidental to oil and gas exploration, development, and production activities.

2. Why alternative approaches are not feasible. Section 101(a)(5)(A) states that upon request from a citizen of the United States, the Secretary of the Interior shall allow the incidental, but not intentional, taking of small numbers of marine mammals if certain findings are made. This section also states that the Secretary, subsequent to making such findings, will prescribe "regulations setting forth permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse to [the] species [of marine mammal(s) involved]..." Thus, since regulations are required by the Act, no alternatives were addressed.

3. By what Authority may we publish this rule? Section 101(a)(5)(A) of the Marine Mammal Protection Act.

B. This rulemaking complies with the following determinations and certifications.

1. Regulatory Planning and Review. In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action.

a. This rule will not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit and economic analysis is not required. BP, which is only one player in the oil and gas industry (Industry), conducts exploration, development, and production operations in the geographic area for which incidental take authority is requested. Such North Slope activities

in the Beaufort Sea and adjacent northern coast of Alaska were conducted for many years through 1993 without the benefit of incidental take authority; however, since late 1993, Industry has conducted operations with incidental take authority issued pursuant to regulations first issued by the Service in late 1993 (58 FR 60402), in January 1999 (64 FR 4328), and LOAs. Current incidental take regulations will expire on January 30, 2000.

The Act does not require any entity to possess incidental take authority (in the form of specific regulations and subsequently issued LOAs) prior to conducting otherwise legal operations that may result in the take of marine mammals. Industry operated for years (prior to 1993) in the Beaufort Sea and adjacent northern coast of Alaska without benefit of specific incidental take regulations. They have incurred many, if not most, of the costs associated with activities similar to those costs that likely would be incurred by any specific regulations and LOAs. The costs associated with this rule should be very similar to costs incurred during operations associated with the existing regulations.

Expenses will be related, but not necessarily limited, to development of applications for regulations and LOAs, monitoring, record keeping, and reporting activities conducted during Industry oil and gas operations, development of polar bear interaction plans, and coordination with Alaska Natives to minimize effects of operations on subsistence hunting. Compliance with the rule is not expected to result in additional costs to Industry that it has not already been subjected to for the previous 6 years. Realistically, these costs are minimal in comparison to those related to actual oil and gas exploration, development, and production operations. The actual costs to Industry to develop the petition for promulgation of regulations and LOA requests probably does not exceed \$500,000 per year, far short of the \$100 million "major rule" threshold that would require preparation of a regulatory impact analysis.

The Federal government would also incur costs, mostly associated with processing applications for regulations and LOAs. Total costs to Industry and the Federal government associated with developing petitions, specific regulations, and requests for LOAs are not expected to exceed \$500,000 - \$1 million per year. Therefore, the rule is not expected to increase costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions; and it can be concluded that the rule is not "major" because its implementation would not result in an annual gross effect on the economy (the sum of total costs plus total benefits) of \$ 100 million or more.

The rule is not expected to have adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. This rule was developed because BP petitioned the Service to authorize incidental take of polar bears and Pacific walrus during oil and gas exploration, development, and production operations according to provisions of Section 101(a)(5)(A) of the Act. Without such authorization, any take of these species (whether lethal or nonlethal, e.g., harassment) occurring during oil and gas activities by BP and other Industry entities in the Beaufort Sea and adjacent northern coast of Alaska is illegal under the Act.

Oil and gas activities have been conducted in this specific region since the discovery of the Prudhoe Bay oil field in 1968. Prior to November 1993, these activities were conducted

without the benefit of specific regulations or LOAs. Since December 1993, Industry has been authorized to take small numbers of polar bears and Pacific walrus while conducting oil and gas exploration, development, and production activities. This authorization was in accordance with Section 101(a)(5)(A) of the Act. Future activities in the absence of specific regulations and LOAs could be adversely affected by legal actions intended to protect marine mammal populations and their availability for subsistence uses. Very simply put, the rule would authorize incidental, unintentional take of small numbers of polar bears and Pacific walrus while concurrently seeking to protect those species, and subsistence uses by Alaska Natives, from impacts resulting from oil and gas operations. At the very least, the rule would benefit employment and productivity because operations would likely continue, something not necessarily assured in the absence of a rule and LOAs. However, this cannot be stated with any degree of certainty because it would require predicting the outcome of legal challenges to continued oil and gas operations without incidental take authority under the Act.

b. This rule will not create inconsistencies with other agencies' actions. The State of Alaska's Department of Natural Resources issues permits for activities on State land. The Minerals Management Service issues permits for activities in the Outer Continental Shelf. These regulations will allow U.S. citizens to conduct otherwise legal operations under the prohibitions of the Act.

c. This rule will not materially affect entitlement, grants, user fees, loan programs, or the rights and obligations of their recipients. This rule does not affect entitlement programs.

d. This rule will not raise novel legal or policy issues. This rule is similar to previously issued rules for Industry in Alaska; the Service issued incidental take rules for the Chukchi Sea on June 14, 1991 (56 FR 27443), the Beaufort Sea on November 16, 1993 (58 FR 60402), and again in the Beaufort Sea on January 28, 1999 (64 FR 4328).

2. Regulatory Flexibility Act. I certify that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory flexibility Act (5 U.S.C. 601 et seq.). A Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required. No individual small industry within the United States will be significantly affected and no changes in the demography of populations are anticipated.

The proposal to establish specific regulations authorizing and governing the incidental, unintentional taking of polar bears and Pacific walrus during oil and gas operations in the Beaufort Sea area is not expected to have a significant economic impact on a substantial number of small entities. Oil and gas corporations, their contractors, and support industries are likely to be the only applicants for LOAs authorizing incidental take under the proposed specific regulations because they are the only companies with the necessary capital assets and technological capability to be able to conduct oil and gas activities and, therefore, to avail themselves of the specific regulations. Under the Regulatory Flexibility Act, such entities are not considered small businesses.

It is possible this rule will make available a few local hire positions, such as an environmental consultant to perform and document a polar bear monitoring and reporting study. Local Alaska Natives may be hired as local polar bear observers. However, these studies and observations would not approach \$ 100 million in cost.

The possibility exists that provisions intended to minimize impacts to polar bears and Pacific walrus under specific regulations and any additional conditions in LOAs could provide somewhat greater protection for Alaska Native subsistence uses of these species. However, there are no data to support this statement. Even if such data did exist, the benefits to Alaska Natives (who would be considered "small entities" under the Regulatory Flexibility Act) would probably be minimal because oil and gas activities prior to 1993 (conducted without benefit of specific regulations and LOAS) were carried out taking care to minimize disturbances to polar bears and walrus and, thus, assure their availability for subsistence uses by Alaska Natives.

The Service, in light of the above analysis, has determined that the rule will not have a significant economic effect on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Therefore, it has been determined that a "small entity flexibility analysis" study is not necessary.

3. Small Business Regulatory Enforcement Fairness Act. This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of \$100 million or more. Expenses are related, but not necessarily limited, to development of applications for regulations and LOAs, monitoring, record keeping, and reporting activities conducted during Industry operations, development by Industry of polar bear interaction plans, and coordination with Alaska Natives to minimize effects of operations on subsistence hunting. Compliance with the rule will likely not incur additional costs to Industry that it has not already been subjected to for the previous years. Realistically, these costs are minimal in comparison to those related to actual oil and gas exploration, development, and production operations. The actual costs to Industry to develop the petition for promulgation of regulations and LOA requests probably does not exceed \$500,000 per year, far short of the \$100 million "major rule" threshold that would require preparation of a regulatory impact analysis.

b. Will not cause a major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions. The Federal government would also incur costs, mostly associated with processing applications for regulations and LOAs. Total costs of Industry and the Federal government associated with developing petitions, specific regulations, and requests for LOAs are not expected to exceed \$500,000 - \$1 million per year. Therefore, the rule is not expected to increase costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions; and it can be concluded that the rule is not "major" because its implementation would not result in an annual gross effect on the economy (the sum of total costs plus total benefits) of \$100 million or more.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. The rule is not expected to have adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. This rule was developed because BP petitioned the Service to authorize incidental take of polar bears and Pacific walrus during oil and gas exploration, development, and production operations according to provisions of Section 101 (a)(5)(A) of the Act. Without such authorization, any take of these species (whether lethal or nonlethal, e.g., harassment) occurring during Industry activities in the Beaufort Sea and adjacent northern coast of Alaska is illegal under the Act. However, there is no specific provision in the Act that requires any company to obtain incidental take authorization prior to conducting activities that might result in the take of marine mammals.

4. Unfunded Mandates Reform Act. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, et seq.):

a. This rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. The Service has determined and certifies pursuant to the Unfunded Mandates Act that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year, i.e., it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The Service has determined and certifies pursuant to the Unfunded Mandates Act that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities.

5. Takings. In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. It has been determined that the rule has no potential takings of private property implications as defined by Executive Order 12630. The rule is not expected to have a potential takings implication under Executive Order 12630 because it would authorize take of polar bears and Pacific walrus by oil and gas companies pursuant to provisions in the Act and thereby exempt them from civil and criminal liability.

6. Federalism. In accordance with Executive Order 12612, the rule does not have significant Federalism effects. A Federalism assessment is not required. This rule will not have substantial direct effects on the States, in their relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

7. Civil Justice Reform. In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order. The

proposed rule has been reviewed to eliminate drafting errors and ambiguity, written to minimize litigation, and provides a clear legal standard for affected conduct rather than a general standard, and promotes simplification and burden reduction.

8. Paperwork Reduction Act. These regulations require information collection under the Paperwork Reduction Act. General regulations in 50 CFR 18.27 (that implement the provisions of Section 101(a)(5)(A) of the Act) contain information collection, record keeping, and reporting requirements associated with development and issuance of specific "umbrella" regulations and LOAs that are subject to Office of Management and Budget (OMB) clearance under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) The request for regulations includes information collection and record keeping requirements. The collection of information contained in this subpart has been approved by the Office of management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

9. National Environmental Policy Act. We have analyzed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA) and 318 DM 2.2(g) and 6.3(D). The Service has prepared a draft Environmental Assessment (EA) in conjunction with this rulemaking. At the time a final decision is made, the Service will decide whether this is a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of the NEPA. Presently, however, the Service believes this rule will not constitute a major Federal action significantly affecting the quality of the human environment. A draft EA is attached. Copies of the draft EA are available by request to the Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, AK 99503, telephone 907/786-3800.

The selected alternative promulgates regulations that allow the incidental take of small numbers of polar bears and Pacific walrus during year-round oil and gas activities in the Beaufort Sea and adjacent northern coast of Alaska. Activities must be conducted in accordance with standard operating procedures and in accordance with Federal and State laws. Intentional harassment, hunting, capturing, or killing are not authorized. The alternative includes mitigation, monitoring, and reporting requirements specific to subsequent LOAs. Each request for a LOA is reviewed by the Service and a determination made on the adequacy of mitigation, monitoring, and reporting requirements to protect the species and their availability for subsistence purposes.

10. Government-to-Government Relationship with Tribes. The Alaska Native community is aware of this proposal. They have been advised by a direct mailing of the Industry application. The application was sent to the Alaska Nanuuq Commission, the Eskimo Walrus Commission, the Alaska Eskimo Whaling Commission, and the North Slope Borough. When activities resulting from these proposed regulations may affect Native resources, a Plan of Cooperation must be developed with the Natives.

C. Approvals.

I have made each of the certifications/determinations specified above based upon the material in this record or compliance or documents indicated in each section above. I have ensured that this document will be distributed in accordance with part D below.

/s/ Rowan Gould
(Signature and title of lead Official)

November 03, 1999
Date

Concur:

/s/ Jamie Rappaport Clark
*(Signature and title of head of Bureau or
Office or other approving official)*

November 09, 1999
Date

/s/ Donald J. Barry
*(Signature and title of program Assistant
Secretary or approving official)*

November 18, 1999
Date

D. Distribution

Copies of this document will be distributed to:

- Office of Regulatory Affairs (ORA)
- Office of Policy Analysis (PPA)
- Office of Small and Disadvantaged Business Utilization (OSDBU)
- Chief counsel for Advocacy, Small Business Administration (SBA)

cc: DIR. RF
AF RF
DAF
MA Surname
MA Hold
Horwath
R-7/MMM